UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

STATESBORO DIVISION

KEVIN TYRONE SAUNDERS,	)	
	)	
Movant,	)	
	)	
v.	)	Case No. CV616-072
	)	CR609-042
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Over six years ago Kevin Saunders pled guilty to, and was sentenced for, unlicensed dealing in firearms, distribution of five grams or more of cocaine base in a school zone, and carrying a firearm during or in relation to drug trafficking under 18 U.S.C. § 924(c). Doc. 63.[1] Because he never appealed, Saunders' convictions became final on March 15, 2010. *Id.* (entered March 1, 2010); Fed. R. App. P. 4(b)(1)(A) (criminal defendants must file a notice of appeal within 14 days of the entry of judgment). He now moves, for the first time, under 28 U.S.C. § 2255 for resentencing. Doc. 74.

[1] All citations are to the criminal docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

Saunders argues that *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), "has the direct action of invalidating and making illegal the portions [(of what Saunders never says)] relevant to the movants instant sentence." Doc. 74 at 4. He premises his motion's timeliness on *Johnson* retroactively applying to his case. *See id.* at 10; 28 U.S.C. § 2255(f)(3); *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (*Johnson* is a new substantive rule and thus applies retroactively to cases on collateral review).

The Armed Career Criminal Act ("ACCA") -- the statute *Johnson* addressed -- provides enhanced penalties for defendants who are (1) convicted of being felons in possession of firearms in violation of 18 U.S.C. § 922(g) and (2) have "three prior convictions . . . for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as, among other things, a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at § 924(e)(2)(B). *Johnson* found that "residual" clause so vague as to violate due process. *See* 135 S. Ct. at 2557. Importantly, it said nothing about "serious drug offenses," which remain a valid basis for ACCA enhancements. *See id.* at 2563 ("Today's

decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony," much less its definition of "serious drug offense").

Saunders' sentence includes no ACCA enhancement. Although he never explains how *Johnson* nevertheless applies to his case, only two possibilities exist. First, he could point to his increased Sentencing Guidelines base offense level under U.S.S.G. § 2K2.1(a)(3), which contains language similar to that *Johnson* invalidated. *See* Presentence Investigation Report (PSR) ¶ 30; *compare* U.S.S.G. § 4B1.2(a)(2), *with* 18 U.S.C. § 924(e). That argument fails because, at least in this Circuit, *Johnson* does not apply to the Guidelines. *United States v. Matchett*, 802 F.3d 1185, 1194-95 (11th Cir. 2015); *In re Griffin*, ___ F.3d ___, 2016 WL 3002293 at * 4 (11th Cir. May 25, 2016) (even mandatory sentencing guidelines cannot be unconstitutionally vague).[2]

Second, Saunders could argue that *Johnson* eliminates his § 924(c) conviction because it, too, contains ACCA-residual-clause-esque

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[2] In a more recent opinion, a different Eleventh Circuit panel cast serious doubt on *Griffin*'s validity (and to an extent *Matchett*). *See In re Sapp*, ___ F.3d ___, 2016 WL 3648334 at * 3 (July 7, 2016) (concurring opinion of all three panel judges). Nevertheless, as *Sapp* recognized, this Court is "bound by *Griffin*" and *Matchett* even if those opinions are "deeply flawed and wrongly decided." *Sapp*, 2016 WL 3648334 at * 3.

language. Even assuming *Johnson* applies to § 924(c),[3] it provides him no succor here. Under that provision, a person cannot use or carry a firearm during or in relation to "any crime of violence *or* drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) (emphasis added). Although one clause of its crime of violence definition is similar to the ACCA's residual clause, Saunders committed a drug trafficking offense. *See* doc. 63 at 1.

Johnson has no conceivable application in that context. That's because it says nothing about the viability of "serious drug offense"[4] predicates. *See* 135 S. Ct. at 2563. The term "drug trafficking crime" in § 924(c)(1)(A) covers similar ground as that ACCA phrase.[5] Just as *Johnson*'s logic failed to implicate drug offenses in the ACCA context, so too does it not apply to "drug trafficking crimes" for purposes of § 924(c).

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[3] Some courts have found that it does. *See, e.g.*, *United States v. Baires-Reyes*, 2016 WL 3163049 at * 5 (N.D. Cal. June 7, 2016) (finding that § 924(c)'s residual clause is unconstitutionally vague). In this circuit it remains an open question. *See In re St. Fleur*, ___ F.3d ___, 2016 WL 3190539 at * 3 (11th Cir. June 8, 2016).

[4] Under ACCA, "serious drug offense" means, among other things, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

[5] "Drug trafficking crime" under § 924(c)(2) "means any felony punishable under the Controlled Substances Act."

It follows that Saunders cannot look to *Johnson* and § 2255(f)(3) to define when his one-year statute of limitations began to run. Instead, he's relegated to § 2255(f)(1), which dictates that the clock started the day his conviction became final (March 15, 2010). His time to file for § 2255 relief thus expired on March 15, 2011, so his motion is untimely by over five years (he did not file it until June 8, 2016, doc. 74 at 12).[6]

Accordingly, Saunders' § 2255 motion should be **DENIED**. His motion to appoint counsel (doc. 75) *is* **DENIED**. Applying the Certificate of Appealability (COA) standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue either. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2255 ("The district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant.") (emphasis added). Leave to proceed *in forma pauperis* on appeal therefore is moot.

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[6] Equitable tolling can, in exceptional circumstances, allow untimely motions to proceed. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). So can a "'fundamental miscarriage of justice'" that "'has probably resulted in the conviction of one who is actually innocent.'" *Fail v. United States*, 2016 WL 1658594 at * 4 (S.D. Ga. Mar. 24, 2016) (quoting *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013)). Saunders invokes neither tolling nor the miscarriage exception, and offers no new evidence or exceptional circumstances to trigger either.

SO REPORTED AND RECOMMENDED this 25th day of July, 2016.

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA